



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Objection of the Tri-County
Power Boat Alliance to the Slow-No-Wake
Extensions on the Wolf River by the Town of
Fremont and Village of Fremont in Waupaca
County, Wisconsin

Case No.: IH-01-06

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Town of Fremont, c/o Robert Meydam and the Village of Fremont, c/o Joseph Smith, completed filing an application with the Department of Natural Resources to regulate water traffic on the Wolf River in the Town of Fremont, Waupaca County, Wisconsin. The new ordinance expands the slow-no-wake area on the Wolf River on weekends and holidays within the Town and Village areas.

The Department of Natural Resources received an appeal from Mark Bachman on behalf of the Tri-County Powerboat Alliance, pursuant to Wis. Stat. §§ 30.77(3)(dm)(2g) and 227.43.

On June 25, 2001, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

Pursuant to due notice hearing was held on July 18, 2001, at Waupaca, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding. The parties requested an opportunity to submit written briefs, and the last brief was received on August 17, 2001.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

Attorney Michael A. Lutz
P. O. Box 7921
Madison, WI 53707-7921

Village of Fremont, by

Joseph Smith, Village President
P. O. Box 512
Fremont, WI 54940

Daniel Sambs, Village Trustee
403 South River Road
Fremont, WI 54940

Town of Fremont, by

Eathan Welch
E7341 Welch Road
Fremont, WI 54940

Tri-County Powerboat Alliance, by

Attorney Richard J. Carlson
Silton, Seifert, Carlson Gamble
331 East Washington Street
Appleton, WI 54911-5488

Glenn Koepp, Consulting Engineer
930 Chapel Hill Road
Madison, WI 53711

Charles B. and Carol J. Whittemore
731 South River Road
Fremont, WI 54940

Merlin Haugestuen
519 South River Road
Fremont, WI 54940

Dale Phillips
733 South River Road
Fremont, WI 54940

David Schmidt
E7435 Red Oak Road
Fremont, WI 54940

Douglas L. Arndt
N313 County Road 4
Fremont, WI 54940

Carol A. Turner and Joseph Guillory
509 South River Road
Fremont, WI 54940

FINDINGS OF FACT

1. On April 10, 2001, the Village Board of Trustees of the Village of Fremont Waupaca County amended its slow-no-wake area ordinance to extend the controlled area from the eastern down river boundary line of the existing slow-no-wake zone to the south property line of 819 South River Road. The Village of Fremont and the Town of Fremont, by Robert Meydam, Town Chairman, submitted the ordinance for approval and review by the DNR. On May 30, 2001, the Department of Natural Resources approved the form of the ordinance revision but indicated that the Department had concerns as to whether or not the extension of the slow-no-wake area was necessary.

2. The Wolf River is navigable in fact and is a popular resource for fishing and boating. The Village and Town of Fremont is approximately 10 miles up river from Lake Poygan and roughly 25 miles down river from New London. Boaters can navigate this entire stretch of the Wolf, and even further south into Lake Butte des Morts, the Fox River and Lake Winnebago at Oshkosh.

3. The Department received an appeal from Mark Bachman on behalf of the Tri-County Powerboat Alliance pursuant to Wis. Stat. §§ 30.77(3)(dm)(2g) and 227.43.

4. All parties stipulated that Tri-County Powerboat Alliance is a boating organization with standing to challenge the ordinance under Wis. Stat. § 30.77.

5. The proposed expansion of the slow-no-wake zone in the Town and Village of Fremont is approximately one half to three fifths of a mile long, 2830 feet. The previously existing no-wake area in these municipalities is approximately one mile long. All of these areas in the Town and Village of Fremont limit the slow-no-wake ordinance to weekends and holidays, including the proposed expansion.

6. There have been no significant boating accidents in recent years on the stretch of the Wolf River along the Town or Village of Fremont. (Bachman, Beilfuss) A system of buoys and markers has been in place in recent years and are maintained and placed by the Wolf River Preservation Association. (Klatt) There are approximately one hundred buoys between New London and Fremont. (Beilfuss) There are other areas of slow-no-wake along the Wolf River from Fremont to New London, constituting a total of approximately one and a half miles. (Beilfuss) There is more boating traffic in the Fremont area than in New London. (Id.)

7. A new US Highway 10 bridge was constructed over the past two years. The old Highway 10 bridge is in the original slow-no-wake area, and is also identified by lighted cautionary buoys. The new bridge is not lit, and represents a safety hazard to boaters using the Wolf River. While there are plans to mark and light the bridge, this had not been done as of the day of hearing. The area around the new bridge falls within the proposed new slow-no-wake area in Fremont. The area south of the bridge is within the Village of Fremont, the area north of the bridge in the Town of Fremont.

8. It is common for people to fish in small boats under the new US Highway 10 bridge. (Whittemore, Lisi, Knorr, Guillory) People fishing in the public waters under the bridge have been exposed to excessive wakes by boaters in larger boats who have not exercised sufficient caution in reducing their speed. (Id.)

9. There are a variety of shore protective measures employed along most of the shoreline along the proposed slow-no-wake area. (Ex. 2) These include riprap, “Radtke” docks and walls and concrete seawalls. There are some areas not artificially protected by riprap or seawall structures. (Frisbie) This is particularly true on the steeper, less developed west side of the river where the old slow-no-wake area ends. (Knorr) Mr. Koepp testified that there was a steep bank some 75 to 100 yards south of the new bridge. Mr. Koepp provided undisputed engineering testimony that the boats speeding through that area contributed to the failure of shore land protection devices in this area. Koepp opined that wave action from speeding boats contributed 85 to 90 percent of the reason for undermining older shore protection measures in this area. While there is some concern about boats speeding up and slowing down between the previous slow-no-wake zone and the expanded area, the record does not support extension of slow-no-wake zone through the entire area south of the bridge.

10. Based upon the record as a whole, a slow-no-wake area of 100 yards on either side of the new US Highway 10 bridge is “necessary” to protect public health, safety and welfare and to reduce erosion of the steep banks south of the bridge.

DISCUSSION

Wis. Stat. § 30.77 relates to “Local regulation of boating.” In general terms, a local municipality may enact regulations relating to boating—including slow, no-wake areas—so long as such regulations are “necessary for public health, safety, welfare or the public’s interest in preserving the state’s natural resources.” This includes regulation of “restrictions on speed,” including slow-no-wake zones. Wis. Stat. § 30.77(3)(cr)(1) The determination of whether such regulation is “necessary” is to be determined after hearing by a hearing examiner assigned by the Department of Natural Resources. Wis. Stat. § 30.77(3)(dm)(2r)(c).

The Town and Village of Fremont has authority to enact local regulation of boating if it is in the interest of public health, safety or welfare, including the public’s interest in preserving the State’s natural resources. The question that arises is what deference, if any, is owed to the local municipalities given their enactment of the ordinance. At hearing, the Village argued that Wis. Stat. § 61.34 granted it broad authority “to regulate navigable waters” for the good order of the Village, for its commercial benefit and for the public, health, safety, and welfare of the public. There are several important limitations, however. First, on its face Wis. Stat. § 61.34 reads: “Except as otherwise provided by law. . .” The Alliance and the DNR argue persuasively that Wis. Stat. § 30.77 is such an exception. Further, as the DNR notes, Wisconsin courts have required a “clear and unmistakable” delegation of public trust powers from the State to the local municipality and such delegation “cannot be implied from the language of a general statute delegating police powers to cities.” *City of Madison v. Tolzman*, 7 Wis. 2d 570 at 575 (1959)

Plainly, the Village does not have broad authority under Wis. Stat. § 61.34, but has only those powers expressly provided by the legislature in Wis. Stat. § 30.77.

The legislature has reserved review authority to the DNR. Further, Wis. Stat. § 30.77(3)(dm)(2r)(c) expressly provides for a de novo review to ensure that all portions of the effected regulated area of water be necessary. Specifically, Wis. Stat. § 30.77(3)(dm)(2r)(c) indicates that “if the hearing examiner determines that the ordinance or the portion of the ordinance is not necessary for public health, safety, welfare or the public interest in preserving the state’s natural resources, the hearing examiner shall issue an order declaring the ordinance or that portion of the ordinance void.” This is plainly a de novo review of the necessity of the ordinance. A careful review of the record developed at hearing indicates that not all of the area subject to the slow-no-wake area is necessary.

A substantial change in the waterway occurred with the construction of the new US Highway 10 bridge. The record was replete with parties indicating that they would prefer to see the pilings of the new bridge lit to ensure that boaters are aware of this obstacle. Even the Tri-County Powerboat Alliance, prior to hearing, expressed “concern about the new bridge and safe boating in that area.” (Ex. 9) The Powerboat Alliance argues that a cautionary light would be sufficient and that, if it is installed, a slow-no-wake area would not be necessary. However, DNR Warden Knorr testified that his experience with cautionary buoys was that many people ignore them. Mr. Guillory testified to seeing a fisherman nearly overturned from boaters speeding under the bridge. DNR Warden Pat Lisi also described how fishermen like to fish under the new bridge area. More fundamentally, there is a substantial amount of boat traffic on the Wolf River at this location. The visibility around the corner coming under the bridge is not great. DNR Warden Jeff Knorr testified that from the start he believed a 50-yard slow-no-wake zone on either side of the new bridge was the best option available. Further, Knorr opined that due to congestion, the presence of fishing boats, and the possibility of an accident, that a slow-no-wake area around the bridge should be in place whether or not the bridge eventually becomes lighted.

Considering the totality of the record, the Division finds that a 100-yard buffer on either side of the bridge would provide an extra level of safety. The record indicates that a 100-yard slow-no-wake zone on either side of the bridge would be preferable because it would also address erosion concerns just south of the new bridge. (See: Finding #9) However, there is little support in the record of a necessity for the slow-no-wake zone to extend beyond 100 yards south of the new bridge. The ordinance as promulgated by the Village extends the slow-no-wake area to the last river front property in the Village limit. There is no basis in the record to conclude that extending the slow-no-wake zone that far is “necessary” for public health safety or welfare including protection of the State’s natural resources. The record developed at hearing suggests that it might be prudent for the Town and Village to maintain the 100-yard slow-no-wake area near the bridge seven days a week. Mr. Guillory testified of a harrowing incident related to excessive wakes faced by a fisherman under the bridge on the Monday before the hearing. However, the Division does not have authority to expand the scope of the ordinance in this manner. Accordingly, the ordinances should be amended to limit extension of the slow-no-wake area to 100 yards on either side of the Highway 10 bridge.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary Orders in reviews of ordinances promulgated under Wis. Stat. § 30.77(3) pursuant to Wis. Stat. §§ 30.77 (dm, 2R A-C) and 227.43.
2. Any town, village or city may, in the interest of public health, safety or welfare, including the public's interest in preserving the State's natural resources, enact ordinances that are not inconsistent with Wis. Stat. Chapter 30, if the ordinances relate to the use or operation of boats. Wis. Stat. § 30.77(3)(a).
3. If a local entity or a boating organization objects to an ordinance enacted under par. (a) that applies to a river or stream, or to an ordinance enacted under par. (b), on the grounds that all or a portion of the ordinance is not necessary for public health, safety, welfare or the public's interest in preserving the state's natural resources, the procedure under subd 2r, shall apply. Wis. Stat. § 30.77(3)(dm)(2g).
4. The Town and Village had authority to enact the slow-no-wake ordinance however, the area of the zone exceeded the area "necessary for public, health, safety and welfare."
5. The portion of the ordinance approved as set forth below is necessary for public safety and welfare, and to reduce erosion along the banks of the Wolf River.

ORDER

WHEREFORE IT IS HEREBY ORDERED that the ordinance be amended to reflect the following:

Extension of the slow-no-wake area shall be limited to an area 100 yards on either side of the new Highway 10 bridge. This area shall remain slow-no-wake even if the bridge becomes lit and or otherwise marked for boaters.

Dated at Madison, Wisconsin on September 14, 2001.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: _____
Jeffrey D. Boldt
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53 to insure strict compliance with all its requirements.

G:\DOCS\GENDECISION\FREEMONT.JDB.DOC